IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 214 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME-TAX - Applicant(s)
Versus
MAHENDRA N SHAH - Respondent(s)

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Appearance :
MRS M.M. BHATT for Applicant(s) : 1,
MR SUNIL B PARIKH for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 20/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal, Ahmedabad Bench "C" has referred the following question under section 256(1) of the Income Tax Act,1961 (the Act) at the instance of the Commissioner of Income Tax.

> *"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee was entitled to a deduction of a sum of Rs.3,45,000/- as business loss etc.?"*

2 The Assessment Year is 1986-87 and the

relevant accounting period is S.Y.2041. The assessee entered into a contract for importing dates from one M/s.Popular Trading Establishment of Dubai. For this purpose a letter of credit with Union Bank of India, Porbandar had been opened. The Dubai party presented false documents and collected money without loading and dispatching the corresponding quantity of dates. The assessee therefore initiated efforts to recover money from the Dubai party. Through a common acquaintance, one Shri B.V.Shah, the Dubai party could be traced and Shri B.V.Shah forwarded two post dated cheques which were not honoured. Therefore, the assessee claimed a sum of Rs.3,45,000/- as a business loss.

3 The Assessing Officer disallowed the same on the ground that the official of the bank through whom the transactions had been effected should have been careful to check before

releasing the relevant amount in favour of Dubai party, that the shipping documents were correct and genuine. The Assessing Officer further took note of the fact that the assessee had filed a Civil Suit against the bank claiming that the bank was not entitled to recover any sum of money from the assessee.

4 The assesee carried the matter in appeal and the Deputy Commissioner of Income Tax (Appeals) allowed the appeal holding that the loss had been incurred in the course of business. The revenue carried the matter in appeal before the Tribunal, but the Tribunal dismissed the appeal of revenue upholding the decision of DCIT (Appeals).

5 Mrs. M.M.Bhatt, learned Standing Counsel appearing on behalf of the applicant -revenue vehemently reiterated the reasons which weighed with the Assessing Officer to submit that the

Tribunal had committed an error in confirming the order of DCIT (Appeals). It was submitted that in the eventuality of the assessee succeeding in the Civil Suit against the bank, the assessee would not be required to make any payment and would get deduction if the loss is allowed in the year under consideration.

6 Mr.Sunil B.Parikh, learned Advocate appearing on behalf of the respondent resisted the reference and submitted that there was no error committed by the Tribunal so as to warrant interference. He pointed out that, as a matter of fact, the assessee had failed in the suit filed against the bank and hence the apprehension of revenue of getting double benefit was misplaced.

7 As can be seen from the order of the Tribunal it has recorded as a matter of fact, that there

is evidence in the form of telegrams, correspondence as well as assessee's attempt through Consulate General of India to recover the money, but in vain. That two post dated cheques received from intermediary had not been honoured and the assessee had not received anything against the amount which was collected by Dubai party by retiring letter of credit. The Tribunal has also noted the fact that the bank official had been summoned and examined by the Assessing Officer, but behind the back of the assessee and in the circumstances, the said evidence could not be considered.

8 The Tribunal has further recorded the following findings of facts :

[i] That assessee had in fact suffered a loss to the tune of Rs.3,45,000/-;

[ii]The loss related to the business, came to the

knowledge in the year under consideration;

[iii] Contention that the transaction was not genuine was not even the case of the Assessing Officer because the Assessing Officer himself had observed in the assessment order that a fraud had been committed by Dubai party by presenting false shipping documents;

[iv] In face of the correspondence and telegrams on record the assessee had prima facie established incurring of loss, but the revenue had failed to discharge the onus which was clearly on revenue to show that the transaction was not genuine;

[v] That the Assessing Officer had placed undue emphasis on the lapse committed by the bank official but the said fact cannot wipe out the loss incurred by the assessee.

9 In light of the aforesaid findings recorded by the Tribunal while concurring with the view

expressed by DCIT (Appeals), it is apparent that the impugned order of the Tribunal does not suffer from any infirmity. In fact, the entire issue is based on facts and appreciation of evidence without involving any question of law.

10 The Tribunal was thus right in holding that the assessee was entitled to deduction of sum of Rs.3,45,000/- as business loss. The question, therefore, is accordingly answered in the affirmative i.e. in favour of the assessee and against the revenue.

11 The Reference stands disposed of accordingly. There shall be no order as to costs.

(D.A.Mehta, J) (H.N.Devani,J)

m.m.bhatt